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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ABRAHAM GUERRA, Defendant and Appellant.	A126076 (Contra Costa County Super. Ct. No. 05-081407-9)

Defendant Abraham Guerra appeals from a judgment after a jury convicted him of (1) assaulting Taurus Livingston (Pen. Code,[1] § 245, subd. (a)(2)), while personally using a firearm (§ 12022.5, subd. (a)), (2) discharging a firearm with gross negligence (§ 246.3, subd. (a)), and (3) carrying an unregistered concealed and loaded firearm (former §§ 12025, subds. (a), (b)(6), 12031, subd. (a)(1)[2]). The jury found not true an allegation that defendant personally inflicted great bodily injury on Livingston. After denying defendant's motion for a new trial, the court sentenced him to state prison for an aggregate term of eight years. On appeal defendant challenges the admission of gang evidence, the court's instruction on gang evidence, and the prosecutor's rebuttal remarks during closing argument. We affirm.

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[1] All further unspecified statutory references are to the Penal Code.

[2] Effective January 1, 2012, former section 12025, subdivision (a) is now section 25400, subdivision (a); former section 12025, subdivision (b)(6) is now section 25400, subdivision (c)(6); and former section 12031, subdivision (a)(1) is now section 25850, subdivision (a). (Stats. 2010, ch. 711, §§ 4, 6.)

FACTS[3]

A. Prosecution's Case

On March 11, 2008, Taurus Livingston and two of his friends, Joe Hayward, and a man named Earl, were present for a job interview at a store in Antioch. Also present for the interviews were sisters Ayza Holmes and Isabelle Holmes.[4] The men claimed to know Ayza, and they began to verbally harass both women. As the women left the store, they were angry and threatened to call some people and have them physically assault the men. Livingston did not take the threats seriously. The two women left the store before the men. The men left the store with the store's assistant manager Nidia Galarza.

Outside the store, Galarza and Livingston saw Isabelle and Ayza walking to their car. Galarza heard Ayza screaming into her cell phone "that somebody need to get there." Livingston saw the two women drive away in a car. The three men remained outside Haywood's car, smoking cigarettes and talking together and with Galarza for about 10 minutes. No one pulled out a gun.

While Livingston, his friends, and Galarza were in the parking lot, eyewitness Craig Catalina was in his car in the parking lot. Catalina saw defendant and Dwayne Holmes, a cousin of Isabelle and Ayza, walking together through the lot. Catalina saw defendant "just very nonchalantly" start "shooting," spraying the area with four or five bullets, turned back around, and shot twice into the street. Defendant then concealed the gun in his jacket, pulled his sweatshirt hood up to conceal his face, and walked away slowly. Neither Livingston nor Galarza saw the gunman. Livingston heard gunshots and ran to the back of Haywood's car to shield himself. Galarza ducked behind parked cars

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[3] The facts are taken from the transcripts of the jury trial held in June 2009. We grant the Attorney General's unopposed "Motion to Deem the Record on Appeal Augmented," to include transcripts of the audio recordings of police interviews with defendant and Isabelle Holmes, which were furnished to the jury. (Cal. Rules of Court, former rule 2.1040(c) [now rule 8.320(b)(11)].)

[4] To avoid confusion, we hereafter refer to related witnesses by their first names. At the time of the March 11, 2008, incident, Isabelle was defendant's girlfriend. They were living in a rented room in a friend's apartment in Antioch. Defendant and Isabelle married a month after the March 11th incident.

to avoid the bullets. Livingston was shot in the foot and the bullet went through his foot. Just as defendant started shooting, a car with Kevin Holmberg as a passenger came into the parking lot. Holmberg fired three or four shots over the top of the car in which he was riding and into the parking lot. Holmberg fled the scene and was eventually apprehended in Pittsburg.

Catalina followed in his car as defendant and Dwayne left the parking lot on foot. While driving, Catalina called 911 to report the shooting and gave a description of defendant and Dwayne. Catalina saw Dwayne heading towards Ayza's car before the police took over the pursuit of it. While attempting to locate Ayza's car, the police saw Isabelle outside the car in front of the apartment building where defendant and Isabelle were then living. When she saw the police, Isabelle ran away and tossed her purse before she obeyed the police request to stop. The purse contained a partially loaded semiautomatic Ruger nine-millimeter handgun, in a single-action position with the hammer cocked back. While the police were detaining Ayza and Isabelle at the apartment complex, defendant and Dwayne approached on foot and were also detained. The police recovered a flannel jacket and a hooded black jacket from the area where defendant and Dwayne had been earlier seen walking by the police. The flannel jacket contained a right-hand latex-like glove. The black jacket concealed a fully loaded black semiautomatic nine-millimeter Ruger gun.

At the scene of the shooting in the parking lot, police found two cars with bullet holes in them. Seven fired or expended bullets or bullet fragments were recovered, including bullets that were found in the two damaged cars. Six nine-millimeter expended shell casings were found on the ground about 100 feet away from the damaged vehicles. About four hours after the shooting, a search of Haywood's car indicated bullet grazes or an entry marking on the outside, and no guns or contraband were found inside the car.

The police issued search warrants and recovered several cell phones, one from defendant, one from Ayza, one from Dwayne, two from Holmberg, and two from the car in which Holmberg was riding. The subpoenaed phone records showed multiple calls between the cell phones of Ayza and defendant, Ayza and Dwayne, Dwayne and

Holmberg, and Dwayne and a cell phone recovered from car in which Holmberg was riding. Before the shooting, multiple calls were made from Ayza's cell phone to defendant's cell phone from 10:00 a.m. to 11:32 a.m. Calls were made from Ayza's cell phone to Dwayne's cell phone twice, at 11:19 a.m. and 11:24 a.m. After the second call, a call was made from Dwayne's cell phone to Holmberg's cell phone at 11:24 a.m. Between 11:29 a.m. and 11:33 a.m., five calls were made from Dwayne's cell phone to a cell phone recovered from car in which Holmberg was riding. Just after the shooting, at 11:44 a.m., a call was made from Dwayne's cell phone to Holmberg's cell phone.

B. Defense Case

Ayza and Isabelle testified regarding their confrontation with Livingston, Haywood, and Earl. At first the three men were friendly towards the women, but then began to disrespect them by calling them names. The men also threatened to shoot the women. During the confrontation with the men, Isabelle called defendant several times using Ayza's cell phone. As the women left the store, the men continued to harass them by calling them names.

Within minutes after Isabelle called him, defendant and Dwayne arrived at the store. Both men were armed. The men who had been harassing the women were then outside the store, still threatening the women. Ayza saw Livingston walking towards her, and he was saying he was going to go to her house and he had a gun. As Livingston kind of stepped back, Ayza saw "the chunky dude," trying to hide, and he was armed with a shiny gun. According to Isabelle, as she and her sister walked to their car, Isabelle saw a man creeping by a car with a gun in his hand. Isabelle did not tell defendant about the gunman. As Ayza got into the car and started to drive off, she heard gunshots. She thought the gunshots were from the "dude that was coming towards [her] with the gun." Isabelle first heard gunshots when the women were in their car at a stop sign. As the women continued to drive, they saw their mother running towards the car and Ayza stopped the car to pick her up. Shortly thereafter, Isabelle answered Ayza's cell phone, and Ayza picked up defendant and Dwayne and drove towards the apartment complex where defendant and Isabelle were then living. When Ayza was in front of the apartment

complex, defendant and Dwayne got out of the car. As Ayza pulled up in front of the apartment building, the police were there and arrested her and Isabelle.

When questioned separately by the police, both Ayza and Isabelle lied about the events before and after the shooting. Ayza did not tell the police about the threats made by the men in the store or that one of the men had a gun. Nor did she tell the police that defendant was at the parking lot or in her car because she did not want to get him in trouble. After she spoke with family members, Ayza thought she could tell the truth in court. Similarly, Isabelle did not tell the police that the men in the store had threatened to shoot the women, that one of the men had a gun, or that she had heard gunshots. Isabelle lied because she was scared, in shock, it was the first time that she had been arrested, and she did not know if she should tell the truth or a lie.

Defendant testified that when Isabelle called him she said, among other things, that some guys had threatened to shoot her. Defendant got dressed, put on latex-like gloves, took an unregistered gun and ammunition from the closet, and woke Dwayne, who was in the apartment. Defendant put on the gloves because if there was a fist fight the gloves would protect his knuckles. He took his gun because he was told the men threatening Isabelle "had a gun." Defendant and Dwayne walked separately to the parking lot, eventually meeting in front of the store. Although Dwayne was right next to defendant, defendant was not really paying attention to what Dwayne was doing and he did not see Dwayne on his cell phone. Dwayne never said he had just called some people and they were going to come and shoot up the parking lot. Defendant did not know that Dwayne was armed until after the shooting.

Defendant and Dwayne met the women in front of the store. As defendant walked the women to their car, he heard people yelling from across the parking lot at Ayza, saying "watch it, bitch or I'll get you," and "we know where you stay." Ayza yelled back, cursing at the men. Defendant took a couple steps away from the women's car to see who was yelling at the women. Defendant saw Livingston and another man walking towards the women's car. As Livingston stopped walking, defendant saw the other man walking between cars, and that man had a gun. Defendant became concerned because the

situation was similar to the circumstances of how his father had been murdered. Defendant did not remember or think that he had shouted a warning to Isabelle. After he saw the gunman, defendant partly turned away from the gunman and started to walk "sideways." As the women drove away in Ayza's car, defendant yelled at the gunman to get his attention and at the same time defendant pulled out his gun. The gunman turned around and pointed the gun at defendant, looked at defendant, they both looked at each other, and "that [was] when [defendant] . . . shot." Defendant fired to protect himself and because the gunman could still have shot at the women's car. However, defendant did not fire any shots until after he heard the women's car tires "screech out" of the stall in which the car had been parked and he could not see their car any longer.

When asked if he ultimately fired the first shots, defendant replied, "[i]t was kind of like the same time." The gunman had his gun pointing "up," but he was not pointing it at anyone, but "[i]t was in the direction where [defendant's] wife was at." After defendant fired the first shot, the gunman shot back, and they "were shooting at each other and [the gunman] started running back towards his car." The gunman was "ducking behind the cars and going quick, . . . [a]nd shooting," as if taking cover. Defendant did not take cover; he was standing in the open. Defendant denied he sprayed the parking lot with bullets, but he admitted he moved his hand from right to left as he fired his gun into the parking lot where there were cars and people. He fired in that manner because that was the direction the gunman was running and shooting at him. When he was shooting, defendant was not trying to aim at a particular person. He "just reacted. That's just the way [he] reacted." When asked why he did not point his gun at the person who had the gun, defendant replied, "Because I didn't want to hit nobody." When asked why he did not just shoot into the air to get the gunman's attention and not risk hurting anyone, defendant said he did not "have enough time to think about that." Defendant did know or remember where Dwayne was while defendant was shooting.

After he fired his gun, defendant put the gun in his pants and left the parking lot; he did not run but he was "speed walking." As defendant left the parking lot, he saw a

car with an unknown man[5] hanging out the window facing away from him. The man in the car was pointing a gun, and defendant heard gunshots. Defendant continued walking out of the parking lot because he did not see his wife. Defendant called Ayza's cell phone to see if the women had gotten out of the parking lot. Shortly thereafter, both defendant and Dwayne were picked up by Ayza in her car. When defendant got into Ayza's car, he did not tell the women what had happened in the parking lot. He was nervous, but he tried to be calm. Without saying anything to the women, defendant hid his gun in Isabelle's purse and he and Dwayne later left Ayza's car to discard defendant's jacket and gloves and to hide Dwayne's gun.

When questioned by the police, defendant was told he could have an attorney present but he did not ask for counsel because he wanted to know what evidence the police had before he told them his version of the events. He said that the men in the store had not threatened to shoot the women, and that when he went to the store to meet the women he was not armed and did not shoot at anyone in the parking lot. Instead, defendant told the police that he walked up to the men who had been harassing the woman to try to fight them, and that the men pulled out guns and started to shoot at him. When asked at trial if that was a lie, defendant replied, "it wasn't all a lie," but he lied about walking up to the men and the men being the only ones who had guns. Defendant lied to police because he did not want to admit he had a gun. He gave a statement putting all the blame on everyone else because he did not know his rights at the time and so he did not want to say too much about what he had done.

DISCUSSION

I. Admission of Gang Evidence

A. Relevant Facts

During the People's direct case, in the event defendant chose to testify, the prosecutor moved to introduce evidence that defendant was an active Norteño gang member. In support of the request, the prosecutor contended, "While looking into the

[5] Defendant denied he knew Holmberg, who was identified as the shooter.

death of the defendant's father, the San Francisco Police Department sent numerous police reports relating to the defendant as well as photographs showing the defendant with red-bandanas, with [another] known gang member, flashing gang signs. The other shooter in this case, . . . Kevin Holmberg is also an active Norteño [g]ang member. Based on the defense[,]s opening statement[,] the defendant will likely deny all knowledge of the other group of shooters, despite numerous phone calls between the defendant's confederate and the second group of shooters. The common membership of criminal street gang is circumstantial evidence of common motive for the shooting, thus connecting the two groups of shooters. Without this evidence the defendant may use the second group of shooters to try to bolster his claim of self-defense, even though the shooters had the same target and were all talking to the same people immediately preceding and following the shooting, which is supported by the subpoenaed phone records." The prosecutor also opined that the evidence of defendant's involvement with a gang was relevant to counter his proffered defense that he acted the way he did on the day of the shooting because the threats to his wife were reminiscent of the way his father had died. Contrary to defendant's defense, it was the prosecutor's position that defendant's conduct was "about respect, coupled with the fact that the other group of shooters who just happened to show up and target Taurus Livingston, the other shooter was also a Norte[ñ]o gang member. That . . . connects the two groups of shooters as well. Circumstantial evidence."

The court held an Evidence Code section 402 hearing to determine whether to allow the gang evidence as impeachment. Defendant testified he was neither a participant nor an associate of the Norteño gang, but his deceased father had been a gang participant. Defendant identified photographs in which he is wearing a red bandanna and sporting a tattoo, saying "Rest in Paradise, Abraham H. Guerra Love by Few, Hated by Many," to honor his deceased father. Defendant admitted a red bandanna was associated with the Norteño street gang, and the way he was wearing it in the photograph "kind of" represented Norteños. However, he just had the bandanna on when he was drinking with some friends, "it didn't really mean nothing," and it did not mean he was a gang member.

Defendant also admitted he knew gang signs and that the number 14 was associated with the Norteños. He identified a photograph in which he is making "a 1-4 with [his] hands." At the end of the hearing, the court ruled the prosecutor would be allowed to impeach defendant with evidence of his gang membership based on defendant's "use of gang signs and colors."

At the conclusion of the People's direct case, defense counsel asked for a "continuing objection" to "the use of . . . any gang information . . . ." The court replied, "[T]he gang evidence, if it comes in, will come in for impeachment and motive so [the prosecutor] will need to lay a foundation before it can come in." Before defendant took the stand, defense counsel again asked for "a continuing objection" regarding gang activity. The court noted that defense counsel had a continuing objection, but the prosecutor would be allowed to present impeachment evidence if she laid the proper foundation for the admission of such evidence. The court advised defense counsel that he would have to object to the prosecutor's failure to lay a proper foundation; the court was not going to give counsel "an I'm-objecting-for–all-time–for-all-purposes type of ruling."

During her cross-examination of defendant, the prosecutor questioned him about his gang affiliation. Defendant knew the Norteños were a gang because his father was a gang member. The color red and the number 14 were associated with the Norteños. When asked if he was an associate of the Norteños, defendant replied, "While, like I said, my father—if I'm associated to my father, yes." Defendant also had a cousin, Michael Ortiz, who was "gang-related." Aside from his family affiliations, defendant did not associate with Norteños. At some point, defendant used "gang signs" and wore "gang colors." He claimed he did so because he was mourning for his father. Defendant had several photographs taken after the death of his father and before the March 2008 shooting incident. When asked how using gang signs memorialized his father and his death, defendant replied, "Because he was gang-related," and "his death" was "gang-related." Defendant identified a photograph of himself and Anthony Leyva, who was a friend of defendant's cousin. Defendant was shown wearing a red bandanna. To defendant, the bandanna was just a red rag. The significance of the color red, other then

being connected to the Norteños, was that his father had died because of his gang. One of the photographs showed defendant making a hand gesture of the number fourteen. Defendant knew fourteen was the number of the gang. Leyva also had "his hands up." Defendant took the photograph to honor his father's death by showing his father's gang affiliation. Defendant's father was killed by another Norteño gang member. Defendant also had a tattoo memorializing his father's death. The photographs showing defendant's tattoo, wearing a red bandanna, and "flashing" a 14, were taken at the same time, and it was the only time that defendant took pictures showing gang emblems. Defendant's father tried to discourage defendant from joining the Norteños and defendant never tried to join the Norteño gang. Defendant was somewhat familiar with the gang's belief system. He guessed, but did not know, that respect was a very important concept for the Norteños. Defendant never spoke to his father, his cousin, or Leyva, about the concept of respect as it related to the Norteños.

In rebuttal, the prosecutor called as a witness San Francisco Police Officer Nicholas Chorley, who testified as an expert in the identification, philosophies and cultures of Latin street gangs in San Francisco. Chorley testified to the distinction between a gang member and a gang associate. A gang member was someone whose conduct was "inextricably linked with the criminal activity of the gang." A gang associate had "a lesser level of involvement in the criminal activity. They may be someone who associates socially with a gang on the gang turf. They may have a tangential criminal relationship with a gang." Chorley also opined that a person who was just related to other gang members was not automatically a gang associate. A person who had familial relationships with one or more gang members might be a gang associate, if they participated in sort of gang-related activities, they hung around large groups of gang members in gang turf, and they participated in flashing hand signs, and "[t]hey m[ight] have small relationships to the gang's criminal activity." However, there were situations where a person was close with their gang member relatives, but they were not as involved in the criminal aspects and the overt gang manifestations like someone Chorley would classify as an associate. Chorley further testified "[t]he concept of respect and fear is

extremely important to all the Latin criminal street gangs he had investigated, including the Norteños. A personal insult or an insult to someone's companion could motivate an assault. If a person wanted to continue associating with a gang, "you kind of have to subscribe to the gang tenets."

Chorley testified that while he was working in the Gang Task Force in 2007, he saw defendant "probably twice." He was asked to described one occasion. At that time, Chorley was looking for Michael Ortiz, a suspect in an incident leading to the murder of defendant's father. Ortiz, a known Norteño gang member, was standing in the driveway of his apartment complex. Defendant and Leyva were standing near the entrance to Ortiz's residence. On seeing the officer, defendant and Leyva moved quickly into the breezeway of the apartment building. After defendant passed through the breezeway, the officer searched the area and found a .45 caliber pistol stuck inside a wooden utility box. Chorley also identified three photographs showing defendant wearing clothing and displaying hand signs associated with the Norteño gang. One photograph, which included defendant's deceased father, was "pretty obviously," "some sort of a tribute to his father." However, the other photographs did not included an "outward display" of defendant's deceased father, and "there [was] a very conscious and very direct display of affiliation and allegiance to the Norte[ñ]o criminal street gang by both [defendant] and . . . Leyva, who [was] without a doubt a Norte[ñ]o gang member." Based on the 2007 incident and the photographs, Chorley opined there was insufficient evidence to say defendant was a Norteño gang member, but "without question" defendant was a gang associate.

On surrebuttal, defendant described the circumstances under which he had taken the three photographs "that were used for the gang issues." Defendant explained that Leyva was in the car when defendant's father was killed, and he was a potential or possible witness that could help prosecute the killers. Leyva became defendant's friend after defendant's father died and around the time the photographs were taken. According to defendant, Leyva was "not really" a Norteño gang member, but was "more of [a] wannabe," even though Leyva had shaved 14 into his eyebrows, tattooed 14 on his hands,

tattooed the subset 2-6 on his body, and was arrested for assault with other gang members. The photograph of defendant and Leyva concededly showed defendant "throwing up signs that [were] an allegiance to the Norteño gang." However, according to defendant, the signs were just a tribute. Defendant knew Norteños committed crimes together. Defendant thought an associate was someone who hung around gang members and, he guessed, helped in gang activity. When asked if he considered himself an associate to the Norteño gang, defendant replied, "Well – No, I don't." Defendant did not consider himself to be someone who hung around with Norteños and he did not help them in their crimes or gang activities. Defendant denied he was a "wannabe."

As to the March 11 shooting, defendant denied he knew another group of shooters had responded to the same parking lot and shot in the same direction as he did on that day. He also denied he knew Holmberg was a Norteño gang member. Defendant testified it was not possible for him to know every Norteño in northern California merely because his father had been a Norteño and some of his relatives were Norteños or some of his friends were in San Francisco. Defendant denied Dwayne was in a gang but that did not mean Dwayne did not know some people who were in gangs.

After defendant's surrebuttal testimony, the prosecutor sought leave to present testimony regarding Holmberg's gang membership. In support of the request, the prosecutor argued: "I think the way the testimony came out with my expert, coupled with the defendant's cross-examination, I think it's actually really compelling circumstantial evidence that [defendant] knew that group of shooters was there. It's very coincidental if two Norteños show up and are shooting at the same location. So I would ask leave to present expert testimony as to Kevin Holmberg's gang --. Defense counsel interrupted, stating: "Kevin Holmberg lives out here; my client just moved out here. Kevin Holmberg was . . . called by Dwayne Holmes. My client says he doesn't know Kevin, which is disputed by the prosecution, but there's no evidence he knows Kevin. . . . I think all Norteños know all other Norteños is a little far-fetched. There's quite a few people and quite a few subsets. When [defendant] lived in the Mission there were already a few subsets right in the Excelsior District." The court did not then rule on the

prosecutor's request. However, before the prosecutor called Martinez Police Officer David Londono to testify, defense counsel lodged a "continuing objection" to the prosecutor "bring[ing] in more gang evidence now." According to defense counsel, the proposed evidence "is even more remote. Now they're saying one of the other persons in the other car is a gang member, one out of three and, therefore, since he's a gang member that shows that somehow he's connected to my client, who is a gang member. My client's not a gang member but he was an associate of the people in San Francisco, moves to this area. And there's many, many Norte[ñ]o gangs all over . . . subsets. There's no evidence he even knows it. I just think it's so attenuated." In overruling the objection, the court explained: "[I]f it's so attenuated then it will be of no moment for the jury, but to the Court it would seem to be relevant that somebody has got a problem, Ayza and Isabelle have a problem, and then 15 minutes later two different groups descend at the scene and there is at least an associate in one group and a gang member in another, and they open fire at this parking lot. You can argue its attenuated if you want. I think it's very relevant."

Officer Londono testified he was assigned to the classifications unit of the Martinez Detention Facility. As part of his duties, he was responsible for classifying inmates to make sure they had the appropriate housing based on their charges, and their affiliations with any groups, including gang-type associations or memberships, to ensure the security of the facility and the safety of the staff and other inmates. At this point in Londono's testimony, defense counsel interposed an objection, stating, "Your honor, I have a continuing objection to all this testimony, to the subject matter and to the . . . . The court interrupted, stating: "Yes. It will be noted. Thank you. [¶] You may continue." When questioning resumed, Londono testified that he had interviewed Holmberg regarding his jail classification on March 25, 2008. The interview was prompted by a call from the module deputy, who stated "that Holmberg wanted to be classified as a Norte[ñ]o." Defense counsel interposed an objection on the ground that the testimony was hearsay. The court overruled the objection, stating, "It will be admitted for the nonhearsay purpose to show the effect on the listener." Londono then

continued, "stating that Mr. Holmberg wanted to be classified as a Norte[ñ]o. [¶] I made the decision to leave Mr. Holmberg on the module until such time [as] I had the opportunity to go up to the module and actually conduct the interview, at which time I did on March 25th. And I used the classification questionnaire, DET043 is the form number that we use, and I conducted the interview with Mr. Holmberg, at which time he requested to be classified as a Northerner, which to us means a Norte[ñ]o. And, he, during this interview, admitted to me that he was an active Norte[ñ]o associate out of Pittsburg and affiliated with the set West Boulevard. [¶] At the conclusion of every one of these interviews I always conduct a tattoo check. Mr. Holmberg had a tattoo of West B-l-v-d for West Boulevard on his upper right arm. I took a photograph of that and included that in my paperwork or packet that I submitted to my supervisor." After the interview, Londono notified the module deputy that Holmberg's classification had been changed, "now classified him as a Norte[ñ]o," and Holmberg's "cell assignment" was changed "to that with another Norte[ñ]o." On cross-examination, Londono confirmed the purpose of the classification was to keep rival gang members from being in close contact with each other for the safety of the inmates and the staff. However, the officer was not suggesting that all Norteños either thought alike or were involved in criminal activities between different groups.

After the jury returned its verdicts, defendant moved for a new trial on the ground that the court had erroneously admitted evidence of gang participation. He argued the evidence of gang contacts and affiliations that was allowed into evidence to establish his motive for the charged offenses was in fact only used by the prosecution as character and propensity evidence. Defendant also asserted the gang evidence was "of a most inflammatory sort," including testimony from an independent gang expert, photographs linking defendant to the gang culture, and evidence that one person who shot at the same time as defendant, was associated with the same gang that the expert witness had linked to defendant. In opposing the motion for a new trial, the prosecutor argued that evidence of defendant's involvement in a gang was introduced only as impeachment or rebuttal

evidence on the issue of motive, and not to demonstrate that defendant had a propensity for violence.

In denying defendant's motion for a new trial, the court explained: "The Court did allow the [Evidence Code section] 1101[, subdivision] (b) evidence for the purpose of motive. In this case, there was evidence that the court received through an expert witness that said that gang members or associates of gang members often will retaliate so as not to lose respect, if they don't do that, they'll be considered weak, and it will hurt the gang, and it will hurt their standing. This was the reason for this motive evidence. The court gave a limiting instruction, and the prosecution argued the evidence very narrowly. The expert testified it wasn't just that the defendant was seen with a gang member on one or two prior occasions. The expert testified that the defendant's photographs where he gave gang signs and was wearing gang colors, were all indicative of him being associated with the gang. [¶] Besides the incident in question for the trial where there was a shooting, there was another incident where the defendant was with a gang member, and another weapon was involved. In this case, a second shooter was a [N]orte[ñ]o gang member so it is evidence that the court did allow to show motive. [¶] I'm satisfied that it was properly admitted. [Evidence Code section] 1101[, subdivision] (b) evidence, by definition, allows for certain kind[s] of evidence to be received for specific purposes. In this case, it was to show motive. And when two shooters converge within minutes of an alleged slight, and they are associates of a gang, that's a relevant circumstance for the jury to consider as to why—why it was that these gang . . . associates did this. [¶] The court did allow the evidence . . . [and] there is an Evidence Code [section] that provides for this. And I did weigh the prejudice versus the probative value, and, in this instance, I found—and still find—that the probative value is substantially outweighed by its prejudicial effect, and especially where there was a limiting jury instruction, especially where it was not argued in an improper way. It was [a] very restrictive argument. And also where the jury had the opportunity to hear the defendant's version of the events and his involvement in the gang . . . and they could evaluate that as they chose to."

B. Analysis

Defendant argues that the trial court erred in admitting "highly prejudicial" evidence of his alleged gang membership or association and Holmberg's gang association, and the erroneously admitted evidence violated his "right to due process and led to a fundamentally unfair trial, requiring reversal of his convictions." However, "[t]o prevail on his argument that he was denied a fair trial and due process of law by the admission of gang evidence, [defendant] must show that the admission of the evidence was erroneous, and that the error was so prejudicial that it rendered his trial fundamentally unfair. [Citation.] ' "Only if there are no permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must 'be of such quality as necessarily prevents a fair trial.' [Citations.] Only under such circumstances can it be inferred that the jury must have used the evidence for an improper purpose." [Citation.] "The dispositive issue is . . . whether the trial court committed an error which rendered the trial 'so "arbitrary and fundamentally unfair" that it violated federal due process.' " ' [Citation.]" (*People v. Garcia* (2008) 168 Cal.App.4th 261, 275.)

The parties present extensive arguments regarding the admission of the gang evidence. However, we do not need to address and express no opinion on the court's various rulings in response to the parties' arguments during the trial. As we now discuss, even if any gang evidence should have been excluded, we conclude its admission was harmless under any standard of review. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

"The danger in admitting gang evidence is that the jury will improperly infer that the defendant has a criminal disposition. [Citation.]" (*People v. Williams* (2009) 170 Cal.App.4th 587, 612-613 (*Williams*).) However, any purported error in admitting the gang evidence in this case was " 'unimportant in relation to everything else the jury considered on the issue[s] in question, as revealed in the record.' " (*People v. Neal* (2003) 31 Cal.4th 63, 86.) Absent the gang evidence, defendant did not have an "otherwise credible defense," as he suggests. Defendant essentially admitted he fired his

gun in the manner observed by Catalina, knowing that his actions could cause great bodily injury or death. Defendant's testimony that he acted in self-defense or defense of others was severely impeached by his inconsistent and implausible trial testimony regarding his actions before, during, and after the shooting at the parking lot, as well as his inconsistent statements to the police. His defense was further brought into question by the circumstantial evidence connecting him with Holmberg, including calls between the cell phones of Dwayne[6] and Holmberg immediately before the shooting, as well as Holmberg's sudden presence and shooting at almost the same time or immediately after defendant fired his gun in the parking lot.

Additionally, the gang evidence was not a significant part of the People's case, being no part of its direct case, and being presented in rebuttal only to impeach defendant's credibility and demonstrate any alternative motive for the shooting. During her initial remarks in closing argument, the prosecutor made no specific reference to the gang evidence. In urging the jury to convict defendant of the charged offenses and to disregard his claims of self-defense or defense of others, the prosecutor focused on the *other* evidence, including the testimony of the independent witnesses Catalina and Galarza, the forensic evidence of the shooting found in the parking lot, and the evidence of defendant's conduct before, during, and after the shooting. In response, defense counsel urged the jurors to "decide the case on the evidence in the case itself," and not on the gang evidence, including "a witness who says Holmberg is an associate." In rebuttal, the prosecutor mentioned the gang evidence only in response to arguments made by defense counsel. The prosecutor did not urge the jury to convict defendant because of his gang affiliation, but only on the facts as found by the jury. Also, the jury was instructed that evidence of defendant's gang membership or association alone was insufficient for the jury to find him guilty and only relevant to defendant's credibility and motive, and that evidence admitted for a limited purpose could be considered only for that purpose. There is nothing in the record to suggest the gang evidence had any effect

[6] Dwayne was defendant's apparent accomplice.

on the verdicts. During deliberations, the jury did not request any read back of testimony, and asked the court only for further instructions on the charge of discharging a firearm with gross negligence. Thus, unlike the factually distinguishable situations in *People v. Memory* (2010) 182 Cal.App.4th 835, *People v. Albarran* (2007) 149 Cal.App.4th 214, *People v. Bojorquez* (2002) 104 Cal.App.4th 335, and *People v. Scalzi* (1981) 126 Cal.App.3d 901, cited by defendant, we conclude any error in admitting the gang evidence does not require reversal.

II. Court's Instruction on Evidence of Defendant's Gang Involvement

During a jury instruction conference, the prosecutor proposed the following instruction: "Evidence [of] the defendant's involvement in a gang is only relevant as it relates to the defendant's credibility and motive. Evidence of gang membership [or] association alone isn't sufficient to find guilt." After considering defendant's objection to the jury's use of gang evidence to resolve the issue of his credibility, the court ruled it would give the instruction as proposed by the prosecutor. The court explained, "[I]n the context of this case the evidence of gang membership is relevant with regard to credibility and motive. But it's also a correct statement that evidence of gang membership [or] association is insufficient to find guilt. Just some evidence in the case." Defense counsel then asked if the jury was being told that gang members are more likely liars. The prosecutor responded that the instruction addressed defendant's denial that he was "part of a gang and yet we have photographs and an expert opinion that says he is; therefore, that goes to his credibility and whether he's actually being truthful to the jury." The court stated, "It goes to his bias is one of the reasons for the word credibility."

On appeal defendant does not challenge the gang evidence instruction on the ground that it allowed the jury to consider evidence of defendant's gang involvement as it related to his motive. He argues only that the instruction's reference to his credibility "was false and misleading." He also contends the instruction unfairly undermined his testimony and rendered it likely the jury treated the evidence of defendant's gang involvement differently in resolving his credibility. We conclude defendant's arguments are unavailing.

We initially reject defendant's contention that the instruction's use of the phrase "[e]vidence of the defendant's involvement in a gang" presented defendant's gang involvement "as an established fact." The jury was instructed that its job was to determine the facts by using evidence that was presented at trial. Evidence was defined as "the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else [the court] told [the jury] to consider as evidence," and it was for the jury to determine "what evidence, if any, to believe." Defendant "was required to request an additional or clarifying instruction if he believed that the instruction was incomplete or needed elaboration." (*People v. Maury* (2003) 30 Cal.4th 342, 426.) Because defendant "did not request such amplification or explanation, error cannot now be predicated upon the trial court's failure to give" such a clarification "on its own motion." (*People v. Anderson* (1966) 64 Cal.2d 633, 639.)

We also see no merit to defendant's contention that the gang evidence instruction made it reasonably likely the jury would conclude that his "presumed gang involvement was a factor bearing on credibility requiring different treatment" from other factors to be considered on his credibility. " '[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' [Citation.] ' "The absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole." ' [Citation.]" (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016.) In this case when the gang evidence instruction is viewed in the context of the entire instructions, it is not reasonably likely the jury misconstrued the instruction, as defendant suggests. Using language in CALCRIM Nos. 226 and 316, the court advised the jurors as to how to evaluate a witness's credibility. The jurors were told that "[i]n evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony," including, among other things, whether the witness's testimony was influenced by a bias, the witness's attitude about the case, whether the witness made prior inconsistent statements, and whether the witness had engaged in conduct that reflected on his or her believability. The jurors were also told that if they

found a witness had committed misconduct, they could consider those facts only in evaluating the credibility of the witness's testimony. (CALCRIM No. 316.) The jurors were specifically told that a witness's misconduct "does not necessarily destroy or impair a witness's credibility. It is up to you to decide the weight of that fact and whether that fact makes the witness less believable." (*Ibid.*) The jurors were further advised to "[p]ay careful attention to all of these instructions and consider them together. If [the court] repeat[s] any instruction or idea, do not conclude that it is more important than any other instruction or idea just because [the court] repeated it." It is not reasonably likely that the jury resolved the issue of defendant's credibility by ignoring the general instructions regarding the credibility of witnesses, and relying solely on the instruction concerning the evidence of defendant's gang involvement. Nor is it reasonably likely the gang evidence instruction lead the jurors to understand that defendant's association with a gang made him less credible than any other witness, as defendant suggests. We therefore conclude reversal is not required based on instructional error.

III. Prosecutor's Puzzle Analogy During Closing Argument Rebuttal

At the beginning of her closing argument rebuttal, the prosecutor stated: "I want to begin my rebuttal by just talking briefly again about the burden of proof in this case. [¶] And the reason I put a picture of a puzzle up here is because I think that sometimes, when you hear the description, it's a little vague and it's kind of out there. And one thing I think helps people understand what the burden of proof actually is[,] is to imagine that you're given a puzzle without the lid which shows the picture of what the puzzle's supposed to be. And you see colors on the pieces of the puzzle, you see blue, you see brown. You don't know what the pieces are. And you start to assemble the puzzle. [¶] And you see some streets take shape and may be some buildings. And you think, okay, and maybe this is a small town or a city. I still need a few more pieces to the puzzle. Then you put more and more pieces together and you see Union Street or Market Street. And you think, okay, like I think this is a city puzzle of San Francisco, but I'm not sure. You add a couple more pieces and sure enough, there you see the Golden Gate Bridge beginning to form and Coit Tower, that kind of thing. [¶] Now, you do not need to

complete that puzzle before you know beyond a reasonable doubt that the image you are creating is a picture of San Francisco. [¶] That is the burden of proof beyond a reasonable doubt. You do not have to put every piece of the puzzle together. You have enough of the picture to know beyond a reasonable doubt what happened and that's what you have here."

Defendant contends the prosecutor committed misconduct by using a recognizable iconic image (puzzle of San Francisco) together with a suggestion of a quantitative measure of reasonable doubt, which combined to misstate the concept of reasonable doubt and diminish the prosecution's burden of proof. However, defendant's claim of prosecutorial misconduct is not properly before us. "Because defense counsel failed to object to the prosecutor's comments, defendant can complain on appeal only if timely objection and admonition could not have obviated the prejudicial effects of the remarks. [Citations.]" (*People v. Malone* (1988) 47 Cal.3d 1, 36-37.) There is no evidence that an admonition would not have cured any potential harm if a proper objection had been made to the prosecutor's puzzle analogy. For example, the court could have clarified that the jury was not to consider the prosecutor's reference to a puzzle to be a different standard of proof from the one given in the court's instructions. Consequently, we conclude defendant forfeited his claim of prosecutorial misconduct.

Apparently recognizing that the claim of prosecutorial misconduct is forfeited, defendant contends he is entitled to a new trial because his counsel was ineffective for failing to object and request an admonition. We conclude defendant's contention is unavailing. "To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003.) Ultimately, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the

proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (*Strickland v. Washington* (1984) 466 U.S. 668, 686 (*Strickland*).)

In determining whether trial counsel's conduct " 'fell below an objective standard of reasonableness,' " we "must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." (*Harrington v. Richter* (2011) 562 U.S. __ , __, 131 S. Ct. 770, 787 (*Harrington*).) "Deciding whether to object is inherently tactical, and the failure to object will seldom establish incompetence. [Citation.]" (*People v. Carpenter* (1997) 15 Cal.4th 312, 396.) Defendant contends "this is not the 'usual case' " because "there can be **no** conceivable reason for any failure to object to the misconduct in this case." We disagree. Defendant's claim of prosecutorial misconduct is based on the November 2, 2009 decision in *People v. Katzenberger* (2009) 178 Cal.App.4th 1260 (*Katzenberger)*.[7] However, at the time of the June 2009 trial in this case *Katzenberger* had not been

[7] In *Katzenberger*, s*upra*, 178 Cal.App.4th 1260, the prosecutor used a Power Point presentation consisting of "eight puzzle pieces forming a picture of the Statue of Liberty. The first six pieces came onto the screen sequentially, leaving two additional pieces missing. The prosecutor argued it was possible to know what was depicted 'beyond a reasonable doubt' even without the missing pieces. The prosecutor then added the two missing pieces to show the picture was in fact the Statue of Liberty." (*Id.* at p. 1262.) The *Katzenberger* court held the prosecutor's presentation "misrepresented the 'beyond a reasonable doubt standard.' " (*Id.* at p. 1266.) First, the court noted the Statue of Liberty was so well known that "most jurors would recognize the image well before the initial six pieces are in place" and some "might guess the picture is the Statue of Liberty when the first or second piece is displayed." (*Id.* at p. 1267.) Thus, the jury was left with "the distinct impression that the reasonable doubt standard may be met by a few pieces of evidence. It invites the jury to guess or jump to a conclusion." (*Ibid.*) Second, the court concluded the presentation consisted of an "[i]mproper quantification of the concept of reasonable doubt . . . ." (*Ibid.*) Because the prosecutor argued reasonable doubt was met when six out of eight pieces were on display, she suggested "a specific quantitative measure of reasonable doubt, i.e., 75 percent." (*Id.* at pp. 1267-1268.) Accordingly, the court ruled the prosecutor had committed misconduct by her "use of an easily recognizable iconic image along with the suggestion of a quantitative measure of reasonable doubt combined to convey an impression of a lesser standard of proof than the constitutionally required standard of proof beyond a reasonable doubt." (*Id.* at p. 1268.)

decided and defendant cites no other published California case—and we have found none—before *Katzenberger,* in which a court had held that the prosecutor's use of a puzzle analogy to demonstrate the concept of reasonable doubt was misconduct. In view of this lack of authority, "defendant cannot establish that counsel's failure to object . . . 'fell below an objective standard of reasonableness.' [Citations.]" (*People v. Foster* (2003) 111 Cal.App.4th 379, 385; see *Strickland, supra*, 466 U.S. at p. 690 ["a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct"].)

Additionally, defendant has not shown he was prejudiced by the prosecutor's puzzle analogy. "In assessing prejudice . . ., the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. [Citations.] Instead, [we ask] whether it is 'reasonably likely' the result would have been different. [Citation.] . . . The likelihood of a different result must be substantial, not just conceivable. [Citation.]" (*Harrington, supra,* 131 S. Ct. at pp. 791-792.) Here, "even if the prosecutor's argument was a misstatement of the law, the trial court properly instructed the jury on the prosecutor's burden of proving every element of the charges beyond a reasonable doubt." (*Williams, supra,* 170 Cal.App.4th at p. 635.) Also, using language in CALCRIM No. 200, the court advised the jury that it "must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions." "When argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former, for '[w]e presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.' [Citation.]" (*People v. Osband* (1996) 13 Cal.4th 622, 717.) On this record, it is not reasonably likely the jury would have reached different verdicts had the prosecutor not used a puzzle analogy in describing the concept of reasonable doubt. (See, also, *Katzenberger, supra,*

178 Cal.App.4th at pp. 1268-1269 [prosecutor's misconduct in use of puzzle analogy to illustrate concept of reasonable doubt was not prejudicial error].)

IV. Cumulative Effect of Purported Errors

We reject any contention that reversal is required based on the cumulative effect of the purported errors raised on appeal. "[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill* (1998) 17 Cal.4th 800, 844.) This is not such a case. The record demonstrates that any purported errors, considered individually or collectively, were not so prejudicial as to deny defendant a fair trial or reliable verdicts.

DISPOSITION

The judgment is affirmed.

_____
McGuiness, P.J.

We concur:

_____
Pollak, J.

_____
Siggins, J.